

MAY 28 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOE MYINT TUN,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 04-72715

Agency No. A75-724-487

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted May 20, 2008^{**}

Before: PREGERSON, TASHIMA, and GOULD, Circuit Judges.

Toe Myint Tun, a native and citizen of Burma (Myanmar), petitions for review of the Board of Immigration Appeals' ("BIA") order denying his motion to reopen proceedings to reissue its decision dismissing his appeal from an

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

immigration judge's denial of his application for asylum and withholding of removal. Reviewing for abuse of discretion, *Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004), *amended by* 404 F.3d 1105 (9th Cir. 2005), we grant the petition and remand for further proceedings.

The BIA abused its discretion by failing to address the affidavit and supporting evidence Tun submitted to show he did not receive the BIA's January 5, 2004 order. *See Singh v. Gonzales*, 494 F.3d 1170, 1172 (9th Cir. 2007) (presumption of proper mailing created by transmittal cover letter may be overcome by evidence of non-receipt by a petitioner or counsel). We remand for the BIA to review the evidence in the first instance and to determine whether it is sufficient to overcome the presumption of mailing.

PETITION FOR REVIEW GRANTED; REMANDED.